PUBLIC PROSECUTOR

v.

LIM BONG KAT & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG J
[CRIMINAL TRIAL NO. 47-4 OF 1990]
22 JULY 1992

CRIMINAL PROCEDURE: *Charges under s. 39B(1)(a) Dangerous Drugs Act 1952 - Whether prima facie case raised against first accused - Whether shown to have custody and control of car containing the drugs.*

EVIDENCE: *Experts' opinions - Accuracy of laboratory tests analysing the substance found - Whether test carried out by the Government Chemist conformed to accepted standards and procedures - Break in the chain of evidence in prosecution's case - Doubt raised if any other individual not mentioned by prosecution had the opportunity to handle the drugs whilst in police custody - Admissibility of "newspaper report" as evidence.*

WORDS & PHRASES: *Meaning of (i) "cannot be found" (ii) "Statement" in s. 32 Evidence Act 1950.*

The two accused were charged under s. 39B(1)(a) Dangerous Drugs Act 1952. The police, acting on information, had waited at a specified area for the second accused's car. The second accused was driving and the first accused was the front seat passenger. Upon the police identifying themselves to the two occupants of the car, the first accused got out and ran away. The second accused then reversed the car into a nearby service station. However, both were captured and a search of the car revealed 7 plastic packets of white substance hidden behind the window panel on the driver's side. The packets were later analysed by a Chemist to be heroin with a nett weight of 398.9 grammes.

The second accused raised several issues in his defence:

(i) He challenged the laboratory tests conducted by the Chemist, arguing that the method adopted could not conclusively prove the amount of heroin in the substance to be 398.9 grammes. A forensic scientist testified on behalf of the 2nd accused deposed that there was a probability of an inaccurate final result due to the fact that the substance may not have been completely homogenised in a commercial blender in the mode that had been adopted. He further stated that the coefficient variation of 1.33% used by the Chemist for allowance in the margin of error during analysis was too low. He went on to describe 3 tests which could be used to determine complete homogenity, only one of which was carried out by the Chemist.

(ii) He claimed that the car had been borrowed by other persons on the previous night and on the next morning before the arrest.

(iii) He further contended that there was a break in the chain of evidence in the prosecution case when an Article (D31) and photograph in a Chinese language newspaper describing the two accused and depicting a Superintendent handling the drugs were not adduced or explained in the prosecution case.

Held:

[1] No *prima facie* case was shown against the first accused. The substance was found in the driver's side of the window panel whereas the first accused was seated in the passenger seat in front. He was also not the owner of the car. Thus it could not be proved he had either custody or control of the thing (*viz* the car) containing the drugs.

[2] The contention and opinions advanced by the forensic scientist were not based on universally accepted practices or procedures. Each Chemist is at liberty to apply their individual personal standards as long as these conform with basic procedures in carrying out such tests. It was not proved to the satisfaction of the Court the tests carried out by the Chemist were inherently wrong.

[3] The defence witness who testified that he had seen the car belonging to the second accused being borrowed on several occasions was a bias witness.

[4] Even though the defence could not trace the reporter who had made the report (D31), the words "cannot be found" in s. 32 of Evidence Act 1950 include also a person whose name could not be known as was the fact in this case and the statement was made in the ordinary course of business and/or in the discharge of professional duty. Therefore the report D31 was admissible as evidence.

[5] The photograph in the newspaper fell within the ambit of "a statement" for purposes of s. 32 Evidence Act since it was the photographers' perception of a fact which he saw. In fact, it is a more accurate representation than a verbal description and would be admissible as oral evidence under s. 60 Evidence Act even if the photographer had not testified.

[6] The photograph and the newspaper report from *Sin Chiew Jit Poh* showed the seizure of the said drugs and arrest of both accused. The fact that it was handed over to the Superintendent Fuad for press conference was never mentioned by the investigating officer. Further, no explanation was offered as to the origin of the black markings on the packages of the seized drugs by the prosecution witnesses. Therefore there was a break in the chain of evidence in the prosecutions case.

[Both accused acquitted and discharged.]

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), 39B(1)(a), (2)
Evidence Act 1950, ss. 32, 60

Other source referred to:
Sarkar on Evidence 13th Edn., pp. 429, 636

For the prosecution - Azmi bin Ariffin (DPP)
For the 1st and 2nd accused - Teh Poh Teik; M/s. Abdul Raman Saad & Associates

JUDGMENT

James Foong J:

The 1st and 2nd accused in this case were charged as follows:

> Bahawa kamu bersama-sama pada 19 Januari 1989 kira-kira pukul 2.45 petang di Jalan Perwira 3, Taman Ungku Tun Aminah, dalam Daerah Johor Bahru, dalam Negeri Johor, dengan tujuan yang sama telah didapati mengedar 398.9 gram heroin dan dengan itu kamu telah melakukan satu kesalahan di bawah s. 39B(l)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

The facts of this case are as follows:

On 19 January 1989, on information received, one Inspector Jaafar heading a team of 11 other police personnel laid an ambush at or around Jalan Perwira 3, Taman Ungku Tun Aminah, Johor Bahru. The team was divided into 4 groups. A group led by Inspector Jaafar waited in a car parked by the side of Jalan Perwira 3 near to an entrance of a Caltex Service Station.

At or about 1.30 p.m. Inspector Jaafar noticed a motor car black in colour of Datsun 120Y made bearing registration Number JBE 980 entered into Jalan Perwira 3 travelling in a slow speed. He immediately drove towards the said car. About a few feet from the said car he stopped in front of it, jumped out, shouted "police" and waved his identification card. Just then, he noticed from the front passenger seat of the said car a male Chinese who got out and ran away. The said car then reversed hurriedly and drove into the Caltex Service Station.

Inspector Jaafar got out of his car and approached the said car. There at the driver's seat was the 2nd accused whom he dragged out. Not long thereafter, his team of police personnel brought in the 1st accused.

An initial search of the said car by Inspector Jaafar produced no incriminating evidence. However, while continuing with his search Inspector Jaafar noticed at the door of the driver's side, there was no handle attached to the panel to wind down the wind screen. On being suspicious, he removed the window panel and found therein 7 plastic packets of substance suspected of being drugs together with a black plastic bag. After examining the same, he returned the said exhibits to its original position, ordered the arrest of the two accused and brought the two accused and the said car back to the police station.

At the said police station he had the exhibits marked as E and El to E7 respectively. He then ordered it to be photographed. These are now contained in P.12A & B.

At this material time Inspector Jaafar also weighed the exhibits suspected of containing drugs and found it to be 2.71 kg.

These exhibits were then locked up in Inspector Jaafar's steel cabinet until the next day, 20 January 1989 when he handed it to the Investigating Officer ASP Hamzah.

According to ASP Hamzah, when he received the exhibits, they were already marked with E, El to E7 and on the 7 packets suspected of containing drugs it bears also the signature of Inspector Jaafar and a date. He himself made no further markings on these exhibits. Inspector Jaafar also informed him that the weight of the 7 packets of suspected drugs was 2.71 kg.

ASP Hamzah after receiving the said exhibits locked it in his steel cabinet. On 22 January 1989, he took them out and inserted each of the exhibits in separate envelopes which he marked and sealed. He then returned them to the steel cabinet under lock and key until 25 January 1989 when he removed them to the Chemistry Department for analysis.

On 26 January 1989 the said exhibits were returned to him from the Chemistry Department, which was by then sealed with the Jabatan Kimia Johor Bahru seal. He kept them in his steel cabinet again under lock and key until they were sent to the exhibit store on 30 January 1989. These exhibits were not removed from the store until they were brought to this Court when this trial began.

The Chemist PWl testified that the exhibits she examined were heroin and had a nett weight of 398.9 grams.

At the close of the prosecution case, I acquitted and discharged the 1st accused on the ground that no *prima facie* case was proved against him by the prosecution. The only evidence against the 1st accused was that he was seen running away from the said car from the front passenger side. The said incriminating exhibits were found hidden behind the window panel of the driver's side. The 1st accused was not the owner of the said car nor was he at that material time in control of the same. Therefore the absence of any other evidence to show that the 1st accused had the custody or control of anything containing the said drugs, I find that the presumptions under s. 37(d) of the Dangerous Drugs Act cannot also be applied against the 1st accused in this case.

As for the 2nd accused, after the close of the case for the prosecution, I find that a *prima facie* case was proved against him and called upon him to make his defence.

The 2nd accused testified that the said car belonged to him. However, the said car was frequently borrowed by various people. On the night before his arrest, one Ah Keong, a boyfriend of one of his employees had borrowed the said car. On the morning of the day of his arrest, the 1st accused also borrowed his said car. He recounted his movements on that day of his arrest as follows; 1st accused wished to borrow the said car which he agreed. The 1st accused then drove him from Pontian to Kukup Restaurant, in Kukup where he worked as a manager. They arrived there at about 11 a.m. After leaving him there, the 1st accused drove off in the said car and did not return until about 1.30 p.m. He then got into the said car which was driven by the 1st accused first to Pontian. Then from Pontian he and the 1st accused drove to Taman Tun Aminah in Johor Bahru to have a meeting with one Lee Mun Lee at Mido Restaurant at Jalan Perwira 2. Their meeting was to discuss the opening of a hair dressing saloon. Arriving at Taman Tun Aminah at about 2.40 p.m., he dropped off the 1st accused at Jalan Perwira 3 so that the 1st accused can meet up with the said Lee Mun Lee first, while he proceeded to the Caltex Service Station to have the said car washed. While he was in the said car, Inspector Jaafar dragged him out and searched the same. The 2nd accused denied any knowledge of the said drugs found in the said car.

One of the 2nd accused's main contention in his defence is that the laboratory test carried out by PWl, the Chemist, cannot conclusively ascertain that the amount of heroin in the said exhibits suspected of drugs to be 398.9 grammes. The 2nd defendant called to his defence an expert witness by the name of Dr. Tosesand (DW2), a toxicologist and senior lecturer in Forensic Medicine at Guys Hospital, London.

DW2's testimony centres mainly on 2 aspects of the test carried out by PWl. Firstly, he claimed that without carrying out further test to determine whether the exhibits were completely homogenised after they were blended in a commercial blender may not give an accurate final result.

Secondly, the coefficient variation (C.V.) of 1.33% used by PWl for allowance in the margin of error during analysis of these exhibits was too low.

On the first point, DW2 suggested that there are 3 types of tests that can be used to determine complete homogenity. Of the 3 types of tests, one of which was already carried out by PWl but according to him, it should be done before the actual test on the exhibits to determine whether they are heroin and not after. However, during cross-examination DW2 agreed that his other 2 types of test, (i.e.) the forensic dye test and the radio active test are only used in certain laboratories. According to him, "my 3 methods are not methods accepted by all Chemists. They have their own views on this". Further, DW2's views were not published in any international journal because according to him, it is of no particular scientific importance.

As for the C.V. of 1.33% used by PWl, DW2 alleged that it was too low in his opinion. He would have used a C.V. of 5.7%. According to him the Singapore Scientific Research Centre uses a C.V. of 4.4% for analysis of drug cases. Again after cross-examination, DW2 confirmed that each Chemist must come up with his own C.V. If a Chemist uses a C.V. of 1% there is nothing to say that he is incorrect if he can substantiate it with data.

After studying the testimony of DW2, I find that his 2 contentions are based mainly on his own views and are not universally practised or adopted.

It is confirmed even by DW2 that each Chemist have to set their own individual personal standards on these 2 matters to which they are comfortable with basing on datas and, as long as they conformed with the basic procedures in carrying out their test, there is nothing to say that in applying their individual standards to the test will give an incorrect result. Before me I find no evidence that the standards used by PWl were proved inherently wrong and as such I dismissed the 2nd accused's contention on this point.

I shall now proceed with the 2nd accused's claim that the said car was borrowed by Ah Keong the night before the arrest and by the 1st accused, the morning of the arrest. From the evidence of the 2nd accused, the said car seemed to be a public vehicle where virtually all the 2nd accused's friends can borrow it freely, sometimes even without asking his permission. These people included workers of Kukup restaurant and even boyfriends of his employees in Pontian. I find this difficult to believe and I rejected the same as not being truthful. However, there is the evidence of DW5 who testified that he knew of the 2nd accused owning a car and that on the date of his arrest the 1st accused drove the said car to Kukup Restaurant on 2 occasions; at 11.30 a.m. to drop the 2nd accused and at 1.30 p.m. to pick up the 2nd accused.

After careful observation of this witness while giving evidence, and from his demeanour and manner, I find that he is a bias witness and his evidence cannot be accepted as the truth. DW5 grew up with the 2nd accused, lived virtually next door to him and operated a store selling T-shirts in front of Kukup restaurant which belonged to the 2nd accused's family. DW5 agreed that at 1.30 p.m. on the day in question, the said restaurant was crowded and his business depended on the tourists who patronised the said restaurant. In the light of these circumstances together with the fact that there was limited parking area in front of the said restaurant, even if the 1st accused had sounded the horn of the car at that material time, I have grave doubts of DW5 being able to concentrate on the coming and going of the 1st accused, since he had only seen the 1st accused once before. Further, DW5 in his testimony declared that he cannot even remember the colour, the type and the make and even the registration number of the 2nd accused's car. Under such circumstances I find that this witness could not have ascertained that the 1st accused was driving the 2nd accused's car at the material time.

The third contention of the defence is that there is a break in the chain of evidence in the prosecution's case.

The defence tendered two newspaper cuttings, one from the '*Star Newspaper*' and the other '*Sin Chew Jit Poh*' both dated 24 January 1989. Both these reports seem to fit the description of the arrest of the 1st and 2nd accused on the day in question and, the amount of heroin recovered therefrom were stated as 2.71 kg.

As regards to the *Star* newspaper cutting, DW4 the reporter who wrote the article was called to tender it. In respect of the *Sin Chew Jit Poh* newspaper cutting however, only the chief reporter (DW6) of this press was called. He testified that he kept a record book of all cuttings published by his newspaper relating to police matters and one such cutting that appeared in

this newspaper dated 24 January 1989 is in this record book. This newspaper cutting is tendered to this Court as D31. The learned Deputy expressed to this Court that he had no objection to this newspaper cutting being tendered except to the accuracy of its contents.

The importance of D31 (this *Sin Chew Jit Poh* newspaper cutting) is that besides a description of the arrest and the amount of heroin recovered there is a photograph depicting one Superintendent Fuad giving a sort of press conference and displaying 7 packets of drugs which, according to the learned defence Counsel were the drugs so seized in respect of the arrest of this case. If this is so, then there was no evidence from the prosecution that the 7 packets of drugs in this case were ever handled by Superintendent Fuad.

I questioned the defence Counsel on the admissibility of D31 since the maker was not being called to testify. The learned defence Counsel submitted to me that its admission falls within s. 32 of the Evidence Act 1950. From the evidence of DW6, both the reporter and/or the photographer who took the photograph in D31 could not be traced, because the records relating to them were misplaced when the newspaper office was moved.

After careful consideration, I allowed D31 to be admitted under s. 32 of the Evidence Act 1950 as I find that the prerequisite conditions therein were fulfilled. I accepted the proposition as stated in *Sarkar on Evidence*, 13th Edn., at p. 429, where the persons "cannot be found" as used in our s. 32 of the Evidence Act should include persons whose names could not be known as is the fact in this case. Further, I also find that the statement so made are done in the ordinary course of business and/or in the discharge of professional duty.

Section 32 of the Evidence Act speaks only of the admissibility of "statements, written or verbal of relevant facts made by a person who is dead or who cannot be found ...". The question then is whether the photograph in D31, which is vital to this case for the defence is a "statement" falling within s. 32 of the Evidence Act.

Photograph properly verified on oath by a person able to speak of its accuracy are generally admissible to prove the identity of things - see *Sarkar on Evidence* 13th Ed., at p. 636. However, in this case, the photographer who took the photograph contained in D31 also cannot be found. Under such circumstance, this Court has to decide whether a photograph will fall within the ambit of "a statement" for the purpose of s. 32 of the Evidence Act. What then is a photograph? To this Court, a photograph is a visual representation of images or impressions of persons or objects recorded by the person who took the picture using a camera. It is therefore his perception of a fact which he saw. In fact this perception is more accurate than a verbal description since it represents the very images and impression of a person or object so taken. As it is his perception then if he is called to testify it would be part of his oral evidence admissible under s. 60 of the Evidence Act. As he cannot be found and, that this Court finds that the prerequisite conditions under s. 32 of the Evidence Act are fulfilled, the photograph in D31 is admissible as an exhibit for this case.

From photograph in D31 together with the statement therein, I find that it refers to the arrest of the 1st and 2nd accused. The reporting in D31 is similar to the facts of this case, including the weigh of the heroin seized. ASP Hamzah in fact testified that Superintendent Fuad did give a press conference relating to this arrest and, the weight which he first understood it to be was 2.71 kg. similar to that as stated in D31.

The photograph in D31 appears together with news reporting and in the photograph there are also 7 packets so displayed. The markings on these packets appear very similar to those on the 7 exhibits containing drugs in this case, particularly the packet on the extreme left of the photograph which clearly depicts the alphabet 'E' which is also used as an alphabet on all the 7 exhibits in this case.

The learned Deputy asserted that the exhibits displayed in the said photograph in D31 could have been exhibits recovered by the police during a police operation against drugs by the name of "Operation Straw", that was going on at the material time. I find it hard to accept when all the description in the statement, the caption beneath the photograph and the time this press release was made, all but points to the similar facts presented in the case relating to the arrest of the 1st and 2nd accused.

I find that from the evidence aforesaid, there is a great probability that the 7 packets so displayed in the photograph of D31 are the 7 packets of drugs seized during the arrest of the 1st and 2nd accused. If such be the case, there is a gap in the prosecution evidence since ASP Hamzah never mentioned that they were handed over to Superintendent Fuad for the press conference. In fact according to ASP Hamzah they were at all material time in his possession kept in his steel cabinet under lock and key. Further, the learned defence Counsel also submitted to this Court of the existence of an unexplained black markings appearing on each on the 7 packets of drugs tendered as exhibits in this Court. Inspector Jaafar testified that he only made the markings of El to E7 on each of the 7 packets respectively together with his signature and a date. ASP Hamzah informed this Court that he made no markings. Similarly, the Chemist, PW1 also testified that she did not make any markings. Since all these people who were supposedly to have handled these exhibits directly did not make these black markings, someone must have done it and, in order to perform such a task he or she must have handled it.

On the basis of all the aforesaid circumstances, this Court finds that there is a break in the chain of evidence in the prosecution case and that, the 2nd accused has on the balance of probability raised a reasonable doubt in the mind of this Court that entitles him to be acquitted and discharged. I therefore order that the 2nd accused be acquitted and discharged.

Also found at [1992] 4 CLJ 2173